

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

THURSDAY, THE 16TH AUGUST 2007 / 25TH SRAVANA 1929

CRL.A.No. 1395 of 2003()

SC.231/2000 ON THE FILE OF THE COURT OF THE ADDL. SESSIONS JUDGE
(ADHOC-I), KASARAGOD.
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APPELLANTS: ACCUSED:

1. HILARI MACHATO, S/O. JOSEPH MACHATO,
AGED 36 YEARS, DODDEMOOLE HOUSE,
KAYYAR VILLAGE.
2. CHANDRASEKHARAN, S/O. SUBHA
VELICHAPPADAN, AGED 34 YEARS,
MANNATHOD, KAYYAR VILLAGE.

BY ADV. SRI.P.V.JAYARAJAN

RESPONDENT: RESPONDENT:

STATE - REPRESENTED BY THE
PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MOHAMMED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD
ON 16/08/2007, THE COURT ON 16/08/2007 DELIVERED THE
FOLLOWING:

Crl.M.A.No. 8423/2003 in Crl.A.No. 1395/2003

Dismissed.

16th August, 2007

Sd/-K. Thankappan,
Judge.

mn.

K.Thankappan,J.

Crl.L.P.No. /2006

Judgment
-12-2006

K. Thankappan, J.

Crl. A. No. 1395 of 2003

Dated this the 16th day of August, 2007

JUDGMENT

Accused Nos.1 and 2 in S.C.No.231/2000 on the file of the Court of the Addl. Sessions Judge (Adhoc-I) Kasaragod are the appellants. They faced trial for an offence punishable under section 55(a) of the Abkari Act on the allegation that they were found in possession of 344 bottles of Indian Made Foreign Liquor namely, Ninety Coconut Fenny each containing 180 ml. capacity. To prove the allegation, the prosecution examined PWs.1 to 3 and Exts.P1 to P5 were marked. After closing the evidence, the appellants were questioned under section 313 Cr.P.C.. They denied the allegation and stated that they had not involved in the commission of the offence as alleged by the prosecution. On the side of the defence, DW1 and DW2 were examined and Exts.D1 and D2 were marked. Relying on the evidence adduced on both sides, the trial court found both the appellants were guilty of the offence punishable under section 55(a) of the Abkari Act and they were convicted thereunder and sentenced to undergo rigorous imprisonment for four years and also to pay a fine of Rs.1,00,000/- and in default of payment of fine to undergo rigorous imprisonment for six months. The judgment of the trial court is challenged in this appeal.

2. Heard learned counsel for the appellant and learned Public Prosecutor and perused the materials placed on records.

3. Learned counsel for the appellant contends that the trial court has committed serious error in accepting the evidence of PWs.3 and 1 to find the appellants guilty under section 55(a) of the Abkari Act. It is also contended that even if the evidence of PWs.3 and 1 is accepted, the finding of the trial court that the appellants had committed an offence punishable under section 55(a) of the Abkari Act is not sustainable in the light of the principles laid down in two decisions reported in Surendran V.State of Kerala (2004(1) KLT 404 , Sudhepan @ Aniyam V. State of Kerala (2005(2) KLT (Cri) 631) . It is further contended that the evidence of PW3 and 1 is not sufficient to hold that the prosecution had succeeded in proving the charge against the appellants.

4. To prove the prosecution case against the appellants, the prosecution relied on the evidence of PWs.3 and 1 who were the Sub Inspector of Police and Head Constable of Kumbla Police Station respectively. PW2 was the only independent witness to support the evidence of PWs.1 and 3. But, this witness had not given any evidence in support of the seizure of the contraband article from the appellants. PW3 stated that on 14-8-1999 he received information that the appellants were keeping in

possession of Indian Made Foreign Liquor at the house of the 1st appellant. He also stated that he along with PW1 and others went to the house of the 1st appellant and when they reached near house No.7/536 the appellants were found standing in the court yard and on search, the contraband articles were found hidden in four plastic sacks and two hard board boxes with cudgon leaves used for the covering the same. On examination, 344 bottles of Ninety Coconut Fenny each of 180 ml. capacity were found. This witness further stated that on preparing Ext.P1 mahazar, the contraband articles were seized. The appellants were arrested and registered a crime against them. This witness further stated that on 15-8-1999 the appellants and the contraband articles were produced before the court. Further evidence of this witness would show that the samples were got analyzed and as per Ext.P5 chemical analysis report, the sample contained ethyle alcohol and on completing the investigation, final charge has been laid before the court. PW1 who accompanied PW3 at the time of detection of the offence had given evidence in tune with that of PW3.

5. Question to be considered in this appeal is whether the judgment of the trial court is sustainable or not?

6. With regard to the argument that the finding of the court below that the appellants had committed an offence punishable under section 55(a)

of the Abkari Act is not sustainable, as per the principles laid down by this Court in Surendran's case (Supra), the case should fall within the ambit of section 55(a) only when a person was found to be in possession of liquor in the course of import, export, transport or transit of the goods. The prosecution case is that the appellants were found in possession of the contraband article. In Sudhepan's case (Supra) this Court held that under section 55(a) of the Abkari Act the prosecution must allege and prove that possession of the contraband liquor was incidental or in connection with export, import, transport or transit of liquor. The prosecution in this case has not proved that the possession of the contraband article was incidental or in connection with export, import, transport or transit of liquor. If that be so, the finding of the trial court that the appellants had committed an offence punishable under section 55(a) of the Abkari Act is not sustainable.

7. It has come out in evidence that DW1 was one of the witnesses who admitted the signature contained in seizure mahazar as well as arrest memo as that of his. He was not examined in this case. There is no explanation offered by the prosecution for non-examination of DW1. There is no evidence that the house from which the contraband article had been seized belongs to the 1st appellant as alleged by the prosecution. In this context, the evidence of PW3 would create doubts regarding the seizure

itself. It may be noted that the definite case of prosecution is that the house in front of which the contraband article was found was having No.VII/531, but in Ext.P1 seizure mahazar the ward number was wrongly written as III. At the same time in Ext.P3 F.I.R. ward number was shown as I. However, the prosecution had not proved that the house belongs to the 1st appellant. At the same time the evidence of DW2 would show that house 3/531 belongs to one Lakshmi and there is no evidence either by PW3 or PW1 that the 1st appellant was the resident or the owner of the house. In this context, it has to be noted that independent witnesses were also available at the place of occurrence, but no independent witness has been examined to prove the seizure. As per the evidence of PW3, the entire contraband and the samples were produced before the court on 15-8-1999, but there is no explanation for the delay in producing the article before the court. As per the principles laid down by this Court in the above two decisions, it is the duty of the prosecution to produce the contraband article before the court within a reasonable time. Considering the over all appreciation of the entire evidence adduced by the prosecution and in the light of the case set up by the appellant under section 313 Cr.P.C., this Court is of the view that the finding of the trial court is perverse. Hence, the impugned judgment is set aside and the appellants are acquitted. Bail bonds executed by the appellants

shall stand cancelled. It is made clear that if any amount has been deposited by the appellants as fine, it shall be returned to the appellants as per law.

The appeal is allowed as above.

K. Thankappan,
Judge.

K. Thankappan,J.

Crl.A. No. 251/2007

Judgment
16-7-2007